

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CENTRO DE LA COMUNIDAD HISPANA
DE LOCUST VALLEY and THE WORKPLACE
PROJECT,

Plaintiffs,

ORDER

CV 10-2262 (DRH)(ARL)

-against-

TOWN OF OYSTER BAY and JOHN VENDITTO,
Town Supervisor of the Town of Oyster Bay,

Defendants.

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LINDSAY, Magistrate Judge:

Before the court is the plaintiffs' motion for a protective order seeking (1) to affirm their entitlement to withhold documents and/or make redactions to documents identified in their December 7, 2011 privilege log that are responsive to the defendants' document requests 10 and 23; (2) to strike the defendants' interrogatories 1-3, 5 and 7-12 and documents requests 3-7, 19, 22, 29 and 33-37, which demand identifying information of the plaintiffs' members and/or specific day laborers known to the plaintiffs; and (3) to prohibit the defendants from seeking discovery regarding the personal identifying information or immigration status of the individual day laborers known to the plaintiffs.¹ For the reasons set forth below, the motion is granted to the extent that the defendants seek discovery regarding the personal identifying information of the individual day laborers known to the plaintiffs.

BACKGROUND

The plaintiffs, two organizations that advocate on behalf of immigrant workers and day

¹To the extent plaintiffs seek to protect against disclosure of immigration status, a review of the interrogatories and document requests fails to reflect any request for such information and as such the court need not presently address this issue.

laborers, commenced this lawsuit on May 17, 2010, alleging that the Town of Oyster Bay Ordinance prohibiting day laborers, standing near a public right-of-way, from stopping or attempting to stop vehicles to solicit work, and drivers from picking up such laborers, violated their constitutional rights to free speech and equal protection of the laws. The plaintiffs simultaneously moved for a temporary restraining order and a preliminary injunction on free speech grounds. The following day, the district court entered a TRO based on the limited information before it.

Thereafter, the court scheduled the preliminary injunction hearing, but before the hearing took place, the defendants asked the court to bypass the hearing and convert the TRO into an appealable preliminary injunction. On consent, the court entered the preliminary injunction as stipulated by the parties. The Town then appealed to the Second Circuit. Although the Second Circuit affirmed the district court's decision, the Second Circuit emphasized that the district court retained the power to reconsider its order granting the preliminary injunction or to leave the preliminary injunction in place and proceed to trial.

Upon receipt of the Second Circuit's decision, the parties agreed that the most efficient course of action was to leave the preliminary injunction in effect and to proceed to a determination of the merits. Accordingly, the stay of discovery was lifted and a scheduling order was entered by the undersigned on August 29, 2011. On October 12, 2011, the Town served the plaintiffs with the discovery demands now at issue.

DECISION

The plaintiffs contend that the above enumerated discovery requests run afoul of their members' First Amendment privilege and/or interest in privacy and that the risks of non-disclosure outweighs the defendants' need for the information. In *NAACP v. Alabama ex rel.*

Patterson, the Supreme Court determined that the First Amendment and the Due Process Clause protects against the disclosure of membership information “where such disclosure would ‘abridge the right of [an organization’s] rank-and-file members to engage in lawful association in support of their common beliefs.’” *Schiller v. City of New York*, 2006 U.S. Dist LEXIS 88854 *10 (S.D.N.Y. Dec. 7, 2006)(citing NAACP, 357 U.S. 449 (1958)). The Supreme Court noted that “state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.” *Id.* “Accordingly, when an organization resisting disclosure of the identities of its members makes a *prima facie* showing that disclosure would infringe upon its First Amendment rights, the burden shifts to the party seeking disclosure to show a compelling need for the information.” *Id.* (citing *New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1355 (2d Cir. 1989)).

In order to make a *prima facie* showing, the resisting party “must articulate some resulting encroachment on [its] liberties,” but need not “make a showing of harm or other coercion.” *Terry*, 886 F. 2d at 1355. Specifically, the resisting party must produce ““specific evidence of past or present harassment of members due to their associational ties, . . . harassment directed against the organization itself, [or a] pattern of threats or specific manifestations of public hostility.” *Schiller*, 2006 U.S. Dist LEXIS at *12-13.

Here, the plaintiffs rely on the declarations of Luz Torres (“Torres”) and Omar Perez (“Perez”). Torres is the Chairman of Centro La Comunidad Hispana de Locust Valley and Perez is the Executive Director of The Workplace Project. Both Torres and Perez state that they are afraid that disclosing information about their membership or activities would deter people from becoming members and expose their organizations and members to retaliation and harassment. Yet, neither affidavit describes any specific past or present harassment of a member because of

their associational ties. Neither affidavit cites any evidence in support of the claims that disclosure would lead to reprisals, or that individuals have either left, or not joined their organizations, when identities were disclosed in the past. While the plaintiffs' burden may be light it is not enough to simply state a fear that bad things may happen. In fact, the record reveals that Centro has freely disclosed its group's activities, as well as the identities of its staff members, including teachers who assist it in the implementation of programs, in their funding requests to the town. Such disclosures are hardly consistent with Centro's claim that public disclosure of their activities or members would harm the association. Moreover, although Torres and Perez declare that member day laborers have been harassed by government officials and law enforcement officers it is clear from their statements, and the record before this court, that such alleged harassment occurs when the laborers publicly gather to seek work having nothing to do with any membership. Accordingly, the plaintiffs have not provided enough evidence to shift the burden to the Town to show a compelling need for the information. *Id.*

However, after thoroughly reviewing the record, the undersigned finds that the plaintiffs are, nonetheless, entitled to a protective order regarding their membership information. Although the discovery requests at issue are drafted broadly, seeking, among other things, meeting notes, minutes and agendas, and draft grant proposals, the Town has indicated, during the course of the parties' discussion and in their papers, that the purpose of the discovery demands is to identify the individual day laborers themselves. The Town has argued, in this regard, that the personal testimony of the day laborers is central to its defenses that "a) the commercial speech at issue in this case is not entitled to any First Amendment protection because it is intrinsically related to the unlawful conduct of the day laborers themselves, and b) that the Ordinance is narrowly tailored to address the real world dangerous conditions created by the personal conduct of the day

laborers as they congregate on the street and sidewalks of the Town.” Defs. Mem. at 2. This argument is unavailing.

The Town argues, in the first instance, that the information being sought is centrally relevant to its defense that the commercial solicitation speech at issue is not entitled to First Amendment protection because it relates to unlawful activities such as side-stepping of tax, employment, workers’ compensation, labor and immigration laws. *See Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). However, Judge Hurley has already indicated that these type of unlawful activities do not render the transaction unlawful for the purposes of the *Central Hudson/Fox* test. Specifically, Judge Hurley stated:

During argument yesterday, there was a discussion about whether the day laborers, who are at least in part the target of this ordinance, are seeking lawful employment. It may be that some of the day laborers are illegally in the country. So does that somehow tinge the transaction with unlawfulness, which would indicate that the speech involved here is not protected under the Constitution?

...

It was my impression - - **and I so conclude** having read some Law Review articles on the subject and some of the cases which, while not directly on point, are partially instructive - - that lawful means that the speech and the transaction that is occurring is either lawful or unlawful. . . .

The fact that some of the day laborers here may be illegally in the country - - and, of course, presumably some are not - - and the fact that to the extent the transaction occurs on a street corner and, accordingly, labor law requirements, may not be satisfied, I don’t think renders the transaction unlawful for the purposes of the *Central Hudson/Fox* test. I don’t believe that is what is meant.

5/20/10 Transcript at 65-66. Although Judge Hurley reached his conclusion in the context of a temporary restraining order, the Town recognized the legal import of the ruling during oral

argument before the Second Circuit:

MR. SINNREICH: . . . the court made legal rulings on the first and fourth prong of Central Hudson that made it impossible for me to win at a preliminary injunction level. . .

THE COURT: Mr. Sinnreich, what if at a factual hearing, you had been - - let's just imagine this - - able to show, that in fact, all of the laborers who potentially are the subject of this ordinance were engage in some form of unlawful conduct .

MR. SINNREICH: Judge Hurley has already ruled that even if that were the case, it doesn't matter because that's not what the first prong of Central Hudson means, and unless this court agrees with me and corrects Judge Hurley on that interpretation, it would not have changed this ruling.

4/26/11 Transcript at 17-18. Indeed, the Second Circuit highlighted the Town's concern in its decision noting

. . . a conclusion that the district court interpreted the 'illegal activity' exception too narrowly, as the Town argues, would not defeat the plaintiff's motion for a preliminary injunction. We would still have to remand for the very hearing that the Town sought to avoid, a hearing to determine, preliminarily, whether and to what degree the barred speech is 'related to illegal activity.

Second Circuit Mandate issued on 5/17/2011 at 5. Given this history, the undersigned will not consider the Town's argument concerning the relevance of the information to its First Amendment defense absent some ruling by Judge Hurley.

Moreover, the court is not persuaded by the Town's argument that the personal testimony of the day laborers is central to its defenses that the Ordinance is narrowly tailored to address the real world dangerous conditions created by the day laborers as they congregate on the street and sidewalks of the Town. Information in support of what the Town believed was the problem, as well as the Town's efforts to contain the problem, which would support their narrow tailoring defense lies with the Town officials that studied the issue. Given that Town sources would have

the information needed to develop the second defense, the Town's request for identifying information of day laborers has little, if any, connection to this defense, and is therefore denied at this time as unduly burdensome.

Accordingly, the plaintiffs' motion for a protective order is granted. The plaintiffs are, however, directed to produce any relevant documents with redactions consistent with this order.

Dated: Central Islip, New York
March 30, 2012

SO ORDERED:

/s/
ARLENE ROSARIO LINDSAY
United States Magistrate Judge